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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

SIDNEY FRIEDMAN, *Petitioner,*

v.

PEOPLE OF THE STATE OF NEW YORK, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST DEPARTMENT

The petitioner, Sidney Friedman, prays that a writ of certiorari issue to review the judgment of the Appellate Term of the Supreme Court of New York, First Department, rendered in the above-entitled proceeding on January 21, 1965.

OPINIONS BELOW

No opinions were rendered in any of the proceedings below. The New York City Criminal Court simply found petitioner "guilty as charged." Tr. 27. The Appellate Term of the Supreme Court of New York,

First Department, after consideration of the appeal, ordered that the judgment of conviction be "affirmed." Thereafter, Associate Judge Fuld of the Court of Appeals of New York denied permission to appeal to that court. See Appendix, p. 1a, *infra*.

JURISDICTION

The petitioner was tried and convicted by three judges of the New York City Criminal Court on a nine-count information charging violations of § 1141 of the New York Penal Law. The trial took place on April 16, 1964 (Tr. 6-25); the judgment of conviction was entered on May 1, 1964 (Tr. 26-29); and on June 15, 1964, petitioner was sentenced to imprisonment in the New York City Workhouse for a period of 30 days on each of the nine counts, said sentences to run concurrently, as well as to a $150 fine or an alternative 30-day imprisonment on each of the counts (Tr. 30-39).

The conviction was affirmed by the Appellate Term of the Supreme Court of New York, First Department, on January 21, 1965. A timely application for leave to appeal to the Court of Appeals of New York was denied on March 4, 1965, by Associate Judge Fuld. This petition for a writ of certiorari is filed within 90 days following that denial.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the proscription in § 1141 of the New York Penal Law of the sale of "sadistic" or "masochistic" books, magazines or other writings is so vague and indefinite as to preclude under the Due Process Clause of the Fourteenth Amendment a state court

conviction for having possessed and sold such characterized material.

2. Whether a state court conviction of a bookseller for the misdemeanor of having possessed and sold an "obscene," "sadistic," or "masochistic" book can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of any absolute right by the defendant to a jury trial and determination of the alleged obscene, sadistic or masochistic nature of the book.

3. Whether the paperback books and magazines here involved can be considered obscene, independently of their characterization as "sadistic" or "masochistic," under any definition of obscenity permitted by the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Constitution of the United States, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

New York Penal Law, Section 1141:

> § 1141. Obscene Prints and Articles
>
> 1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend,

give away distribute, show or transmute, or has in his possession with intent to sell lend, distribute, give away, show or transmute, * * * or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, * * * writing, drawing, photograph, motion picture film, figure, image, * * *

Is guilty of a misdemeanor and upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than one hundred dollars nor more than two thousand dollars or both fine and imprisonment for the first offense: for a second offense, shall be sentenced to not less than thirty days nor more than one year or be fined not less than two hundred fifty dollars nor more than three thousand dollars or be both fined and imprisoned; for a third offense, shall be sentenced to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars.

New York City Criminal Court Act:

§ 31. Jurisdiction

The Court and the judges thereof, except as otherwise provided in this act, shall have jurisdiction with respect to crimes and offenses committed within the city of New York, as follows:

(1) To hear, try, and determine all charges of misdemeanors, except charges of libel; * * *

* * * * *

§ 40. Mode of Trial

All trials in the court shall be without a jury. All trials in the court shall be held before a single judge; provided, however, that where the defend-

ant has been charged with a misdemeanor, other than a charge of misdemeanor under article eighty-eight of the penal law, entitled "gambling," the procedure following arraignment shall be as follows:

(1) The defendant shall be advised that he has the right to a trial in a part of the court held by a panel of three of the judges thereof:

(2) The defendant may at any time before the court hears any testimony upon the trial demand to be tried in such part, or the district attorney or the legal representative of a department of the state or city in charge of the prosecution, at any time before the court hears any witness to give evidence upon the trial, may demand that the trial be held in such part, or the court may, on its own motion, before any witness is heard to give evidence upon the trial, direct that the trial be held in such part; * * *

* * * * *

§ 42. The panel of three judges; informations.

(1) Where the defendant has been held to answer for trial in a part of the court held by a panel of three of the judges thereof as provided in section forty of this act, * * * the action must be prosecuted by information made by the district attorney. The information shall be signed by the district attorney of the county wherein the action was begun and may be substantially in the following form: * * *

STATEMENT OF THE CASE

Petitioner was charged, in a nine-count information, with having sold nine named books in violation of § 1141 of the New York Penal Code. Tr. 5. Each count charged, in statutory language, that the petitioner on January 2, 1964, unlawfully sold and possessed with intent to sell a named "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book,

magazine, pamphlet, story paper, writing and paper of an indecent character." The nine books or magazines were variously entitled "Bondage Boarding School"; "English Spanking School"; "Bound and Spanked"; "Sweeter Gwen"; "Travelling Saleslady Gets Spanked"; "Bound to Please"; "Bizarre Summer Rivalry"; "Heat Wave"; and "Escape into Bondage, Book No. 2".

At the trial, which was held before a three-judge court pursuant to the requirements of §§ 31 and 40 of the New York City Criminal Court Act, the following evidence was presented by the prosecution:

Patrolman Patrick J. O'Boyle testified that on January 2, 1964, he entered petitioner's bookstore at 1105 Sixth Avenue in New York City. Tr. 8. He observed that petitioner's business consisted of selling back-date magazines, as well as books. Tr. 15. And it was later noted by defense counsel, without contradiction, that petitioner had been in business at this location for 32 years and had acquired a national reputation as a source of research material for colleges, libraries and other such agencies.[1] Tr. 31; and see Tr. 33.

The store itself was approximately 25 feet wide and 50 feet long, with wall and center book shelves running practically to the ceiling. Tr. 15. When the patrolman entered the store, he went immediately to a front counter — behind which stood the petitioner — and selected from that counter a book entitled "Bondage Boarding School." Tr. 8. The patrolman gave the book to petitioner, who stated that the price was $3.50. The patrolman then gave petitioner a $5.00 bill; after

[1] Petitioner's reputation in this respect has been publicly noted in Coronet Magazine (May 1945), Life Magazine (December 1953), and Nation's Business (June 1954). See Tr. 31.

placing the book in a paper bag and ringing up the sale on a cash register, petitioner returned the book and the change to the patrolman. Tr. 8. Thereupon the patrolman identified himself as a police officer and placed petitioner under arrest for selling obscene literature. Tr. 10, 13. The patrolman also exhibited a search warrant, which he proceeded to execute. This resulted in the seizure, from the display counter directly in front of the petitioner, of the eight other publications named in the information. Tr. 12. The search warrant had been issued by a judge, based upon his viewing of another copy of "Bondage Boarding School" which the patrolman had purchased at petitioner's store on an earlier occasion in December 1963. Tr. 17, 18.

All of the nine books purchased or seized were received in evidence. R. 10, 13. The patrolman, in testifying that he told the petitioner that the arrest was on a charge of selling obscene books, stated that the petitioner replied to him that "Those books aren't obscene because I got them from the publisher." Tr. 14. The court, however, sustained an objection to defense counsel's effort to cross-examine the patrolman as to "which way these books are obscene." Tr. 14.

No further evidence was offered by the prosecution. The court overruled defense motions to dismiss for failure to prove a prima facie case and for failure to prove a case beyond a reasonable doubt. Tr. 19. No evidence was offered on behalf of petitioner.

Following oral argument by defense counsel, the court found petitioner guilty of all nine charges and imposed a sentence of "$150 or 30 days on each count, and 30 days in the workhouse . . . the straight jail sentence on each count will run concurrently, not consecutively." Tr. 39. The total fine was thus $1350.

At the hearing upon the imposition of sentence, the presiding judge inquired as to what purpose these books served except "to pervert the mind." Tr. 32, 33. He further stated that "there is no question in my mind that basically the hard-core purchasers [of those books] are a group of perverts, but inescapably our children are lured to it." Tr. 37-38. An associate judge also remarked that "you know that they fall into the hands of children also, and are read by them . . . It's got to do a little harm." Tr. 38.

The nine books in question are variously composed of textual matter, photographs, drawings and cartoons. All of them deal exclusively with subjects known as bondage, whipping, spanking, fighting and discipline. None depicts any complete nudity; and none describes or illustrates any scenes of sexual intercourse, normal or abnormal. Nor do they contain any scatological language. In short, they are of the same generic nature as the group of "bondage" and "spanking" books filed with the Clerk of this Court in *Mishkin* v. *New York*, No. 858, Oct. Term, 1964, probable jurisdiction noted, April 5, 1965.[2]

RAISING THE FEDERAL QUESTIONS

New York City Criminal Court. At the outset, the defense counsel moved to dismiss each count of the information "on the ground that they are insufficient as a matter of law in that the prescribed characteristics 'Sadistic' and 'Masochistic' contained therein and con-

[2] The books in the instant case differ in title and publication from those in the *Mishkin* case. Some of the books in the *Mishkin* case, moreover, appear to involve other types of sexual deviations that are not depicted in the instant publications. See Motion to Dismiss, pp. 8-9, filed in *Mishkin*.

tained in Penal Law 1141 are not words of such common understanding that the general public and the defendant are informed thereby of the crime or crimes prescribed by the statute, and the statute is unconstitutional with respect to those characteristics, as those characteristics are constitutionally vague and indefinite." Tr. 7. That this motion was grounded on the Federal Constitution was made clear by counsel's later elaboration (Tr. 19) that "Section 1141, as I stated to your Honors on my original motion, violates the due process clause of the State and the Federal Constitution in that it does not provide for an ascertainable standard of guilt."

Defense counsel further urged (Tr. 21) that the books in question could not be considered as obscene or as hard-core pornography under the standard set forth in *Roth* v. *United States*, 354 U.S. 476, 489.

The Appellate Term. On the appeal from the conviction, petitioner in his brief to the Appellate Term contended *inter alia* that (1) the New York City Criminal Court, composed as it was of three judges acting without a jury, lacked jurisdiction over the criminal proceeding[3] inasmuch as petitioner had an absolute right under the Due Process Clause of the Fourteenth Amendment to a jury determination of the constitutional issue of obscenity, even in a misdemeanor case, (2) the proscription in § 1141 of the sale of "sadistic"

[3] While the jury trial issue had not been raised in the Criminal Court, the issue was raised on appeal in jurisdictional terms. As such, the failure to demand a jury trial did not constitute a waiver of jurisdictional objections and petitioner was entitled to raise such objections on appeal. *People* v. *Nicometi*, 12 N.Y. 2d 428, 431 ("Want of jurisdiction is a basic defect, not a trial error; it may be raised at any time and can never be waived").

or "masochistic" books is so vague and indefinite as to be violative of the First and Fourteenth Amendments, and (3) the books in question could not be considered obscene under any standard permitted by the Federal Constitution as interpreted by this Court.

Motion for leave to appeal. In applying for leave to appeal to the New York Court of Appeals, petitioner reiterated all the foregoing federal contentions. And in denying leave, Associate Judge Fuld carefully noted petitioner's contentions (1) that he was deprived of a jury trial in violation of the First and Fourteenth Amendments and (2) that § 1141, in its proscriptions as to "sadistic" and "masochistic" books, was vague and indefinite and violative of the First and Fourteenth Amendments. He also had before him, although his certificate does not so specify, the claim that the books were not obscene under federal constitutional standards. See Appendix, p. 1a, *infra*.

During the oral argument before him, Associate Judge Fuld indicated that his denial of leave to appeal was predicated largely on the fact that the New York Court of Appeals had recently considered and rejected the identical challenge to the constitutional validity of § 1141 in *Mishkin* v. *New York*, now pending before this Court for decision, No. 858, Oct. Term, 1964.[4] While the other federal constitutional issues were obviously felt by Associate Judge Fuld not to warrant

[4] Associate Judge Fuld denied leave to appeal in the instant case on March 4, 1965, less than two months following the entry on January 7, 1965, of the amended remittitur in the *Mishkin* case. That remittitur stated that the New York Court of Appeals had there held that § 1141 was valid under the Fourteenth Amendment, thereby overruling the claim that § 1141 was void for vagueness in its definitions of sadism and masochism.

review by the New York Court of Appeals, the ruling in the *Mishkin* case was considered decisive with respect to the constitutional attack on § 1141.

REASONS FOR GRANTING THE WRIT

1. This case raises the same question to be considered by this Court in Mishkin v. New York, No. 858, Oct. Term 1964—i.e., whether § 1141 of the New York Penal Law is void under the Fourteenth Amendment for vagueness in defining sadism and masochism.

On April 5, 1965, this Court noted probable jurisdiction of the appeal taken from the New York Court of Appeals in No. 858, Oct. Term 1964, *Mishkin* v. *New York*. Four of the seven questions presented in the Jurisdictional Statement in that case deal with the validity under the Fourteenth Amendment's Due Process Clause of § 1141 of the New York Penal Law as applied to so-called sadistic or masochistic books. More particularly, those four questions presented for determination concern the constitutional validity of § 1141 with respect to (1) its proscription of publications that are sadistic and masochistic, (2) its vagueness in defining sadism and masochism, (3) its vagueness in defining obscenity, and (4) its application to the books in question.

The judgment below in the instant case inescapably presents the same basic constitutional question as to the validity of § 1141. As stated by Associate Judge Fuld, in denying leave to appeal to the New York Court of Appeals, the petitioner was urging "that § 1141 of the Penal Law, in its 'proscriptions . . . as to sadistic and masochistic books', is vague and indefinite and violative of the First and Fourteenth Amendments of the Federal Constitution." And it was the identity of this claim in the instant case with the claim

that had been fully considered and rejected by the New York Court of Appeals in the *Mishkin* case that led to the denial of leave to petitioner to appeal to that court.

At the very least, therefore, this petition should be held by this Court pending its final resolution of the constitutional challenge to the validity of § 1141 in the *Mishkin* case. Petitioner urges, however, that the Court hear and consider this case simultaneously with *Mishkin* in order that the Court have the benefit of the differing arguments of counsel in the respective cases and of the variations in the two factual situations.

The *Mishkin* case involves a defendant who not only was a seller but also a publisher of allegedly sadistic and masochistic material. The petitioner in the instant case, however, is merely a seller of magazines and books. He was but one of numerous book-sellers in the mid-town area of New York City who were the objects of well-publicized police raids and seizures, culminating a vigorous campaign against allegedly obscene publications.[5] Whether the "sadistic" and "masochistic" proscriptions of § 1141 are any more vague and indefinite as applied to a book seller, as distinguished from a publisher, is a matter deserving plenary consideration by this Court. See *Smith* v. *California*, 361 U.S. 147.

The basic constitutional issue as to § 1141, petitioner suggests, must be viewed against the backdrop of the

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[5] "It was common knowledge in January of 1964 that a series of arrests had been made involving these publications. He couldn't have been unaware of it. He was in the business, right in the heart of the place that was being the target of the police drive." Statement of Judge Murtagh at the sentencing of petitioner. Tr. 35.

fact that the "sadistic" and "masochistic" references were added to § 1141 in 1956 (Ch. 681, L. 1956) upon the recommendation of the Joint Legislative Committee Studying the Publication and Dissemination of Objectionable and Obscene Materials (Leg. Doc. No. 32, 1956). The basic premise of that recommendation was that sadistic-masochistic material, although thought to be every bit as harmful as outright pornographic publications, did not come within the basic "obscenity" proscription of § 1141.

"Sadistic" and "masochistic," in other words, may well represent something quite different from "obscenity" and its various statutory synonyms—"lewd, lascivious, filthy, indecent . . . or disgusting," to quote the words of § 1141. See *People* v. *Brooklyn News Co.*, 12 Misc. 2d 768, 771, 174 N.Y.S. 2d 813, 817.[6] Such synonyms are commonly used and reflect the general understanding and awareness of the meaning of obscenity. Thus in *Roth* v. *United States,* 354 U.S. 476, 491, this Court held that the federal and the California obscenity statutes provide reasonably ascertainable standards of guilt by their references to obscenity and its recognized synonyms—lewd, lascivious, filthy and indecent. And in *Swearingen* v. *United States,* 161

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[6] In the *Brooklyn News* case, the statutory adjectives "lewd", "lascivious", "filthy", "indecent" and "disgusting" were held by Judge Sobel of the Kings County Court to be synonyms of "obscene", as those words are used in § 1141. But the court carefully omitted the words "sadistic" and "masochistic" in listing these statutory synonyms. The court also stated: "It is doubtful that any standard other than obscenity could stand the Constitutional test." 174 N.Y.S. 2d at 817.

But in *People* v. *Waldman* (Appellate Term, First Dept., N.Y. L.J., Oct. 2, 1964, p. 15) the court stated that "sadistic" and "masochistic" are synonymous with "obscene" and that § 1141 was therefore constitutional in its entirety.

U.S. 446, 450, 451, the Court construed the words "obscene", "lewd" and "lascivious", as used in the federal postal statute, as all referring to "that form of immorality which has relation to sexual impurity," having the "same meaning as is given them at common law in prosecutions for obscene libel." But whether "sadistic" and "masochistic" can properly be said to be synonyms of "obscene", in a statute entitled "Obscene Prints and Articles", for the constitutional purpose of providing reasonably ascertainable standards of guilt remains the open and critical question.

Sadism, of course, can be said to refer to the infliction of pain upon others, while masochism relates to the gratification of the recipient of cruelty or pain. Both words can be used in the context of sexual perversions involving such acts. But both words can also be used to describe savagery, cruelty, barbarism, brutality and suffering that are quite unrelated to sexual abnormalities.[7] An uncommon amount of human conduct, in the past and at the present, can be characterized as savage and barbaric, or as sadistic and masochistic. Much of that conduct has been portrayed in books, films, television programs and the proscenium. And there as been a veritable Niagara of public condemnation of such exploitation of sadistic savagery and masochistic suffering, unrelated though they be to sexual aberrations.

Therein lies the constitutional vice of an indefinite criminal statutory reference to sadism and masochism.

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[7] For example, Webster's New Collegiate Dictionary (1956) includes in its definitions of "sadism" the following: "c. Loosely and popularly, abnormal delight in cruelty." The word "masochism" is defined *inter alia* to mean "any pleasure in being abused or dominated."

In borrowing these words, did the New York Legislature effectively outlaw only those sadistic and masochistic works with sexual connotations, or did it also encompass all the vast literature of our day which portrays the non-sexual cruelty that may fairly be denominated as sadistic and masochistic? The plain words of § 1141, the unattended references to sadism and masochism, give no answer to that question. In the absence of any clarifying delimitation by the New York courts in this or in the *Mishkin* case, confining the statutory concept of sadism and masochism to that which pertains to sexual aberrations, "we cannot say that it will not be applied with the broad sweep which the statutory language imports." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 434.

What was said by this Court in *Winters* v. *New York,* 333 U.S. 507, with reference to § 1141 before it was amended to proscribe sadistic and masochistic works, becomes of controlling importance here. There the New York statute, as construed to prohibit the sale of a magazine principally made up of news and stories of bloodshed and lust that might incite violent and depraved crimes, was held to be unconstitutionally vague and indefinite. This Court recognized, 333 U.S. at 518, that § 1141 was sufficiently definite in "describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting." But to apply the statute to stories of bloodshed and lust that might incite violent crimes, without limitation "to the indecent and obscene, as formerly understood" (p. 519), opened the door, in the words of *United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 89, to "the widest conceivable inquiry, the scope of which no one can foresee and the result of

which no one can foreshadow or adequately guard against."

And so § 1141, as amended to apply to sadistic and masochistic works without reference "to the indecent and obscene, as formerly understood," raises a most serious question as to its constitutional definiteness in warning men of common intelligence as to what is outlawed. This question, petitioner submits, should be considered by this Court in the context of "an honest distributor of publications" like petitioner who could not "know when he might be held to have ignored such a prohibition." *Winters* v. *New York, supra,* 520. See also *Smith* v. *California,* 361 U.S. 147.

2. Whether a bookseller has an absolute federal constitutional right, in the context of a state misdemeanor prosecution, to a jury-trial and a jury determination of the issue of the obscene, sadistic or masochistic nature of the books he sold is a significant question that should be resolved by this Court.

This case presents a most important constitutional question not involved in the *Mishkin* case, one that concerns an individual right that has been described by several Justices of this Court as vital and necessary in the effectuation of due process of law.

Under the New York City Criminal Court Act, petitioner was absolutely precluded from obtaining a jury determination of the issues raised in the misdemeanor information filed against him. Section 40 of that Act provides that "All trials in the court shall be without a jury." The only choice available is between a trial before a single judge and a trial before three judges (which occurred in this case). Petitioner duly protested this statutory scheme in the courts below. But the New York rule, as stated in *Tenney* v. *Liberty News*

Distributors, Inc., 13 App. Div. 2d 769 (an equity case in which an injunction was sought against the sale of allegedly obscene publications), is that "There is no constitutional right to a jury trial in misdemeanor cases (Constitution of the State of New York, Article VI, § 18)"—permitting misdemeanor trials "without a jury."

In the course of this Court's opinion in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 444, involving an injunctive proceeding under New York law with respect to obscene books, the statement was made that "Of course, the Due Process Clause does not subject the States to the necessity of having trial by jury in misdemeanor prosecutions." But that statement was not only made in the context of a civil proceeding[8] but under circumstances where the issue as to the right to a jury trial in an obscenity matter had not been raised below or brought to this Court for determination. 354 U.S. at 443-444.

As a general proposition, it may be said that States are not obliged to provide jury trials in ordinary misdemeanor prosecutions. But where the misdemeanor prosecution necessarily concerns a determination and application of the constitutional and community standards respecting obscenity, trenching as they

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[8] The *Kingsley* case arose under § 22-a of the New York Code of Criminal Procedure, providing for an equity proceeding as a supplement to conventional criminal proceedings. Section 430 of the New York Civil Practice Act provides for discretionary jury trials in equity proceedings. But the instant case was a strictly criminal proceeding with no right or provision respecting a jury trial on any basis, discretionary or otherwise.

The New York decision in *Tenney*, 13 App. Div. 2d 769, also arose as an equity proceeding under § 22-a of the New York Code of Criminal Procedure. The court's statement as to the absence of a jury trial right in a misdemeanor case must therefore be viewed as dicta.

do upon fundamental principles of free speech and press, an exception to the general rule should be required.

Mr. Justice Brennan, dissenting in the *Kingsley* case, 354 U.S. at 447-448, stated his belief that even under the New York equity procedures, where discretionary jury trials were possible, the absence of an absolute right to a jury trial in an obscenity case was "a fatal defect." After noting that both the *Roth* and *Albert* cases, 354 U.S. 476, involved obscenity statutes allowing a jury trial of right, Mr. Justice Brennan stated (p. 448):

> The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, *i.e.*, that reasonable men may differ whether the material is obscene.

Mr. Chief Justice Warren later expressed his accord with these views in his dissent in *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 68-69, stating that "The inexistence of a jury to determine contemporary community standards is a vital flaw."

Since neither *Kingsley Books* nor *Times Film* involved criminal proceedings in which the jury question was put in issue before this Court, this tribunal did not have occasion to resolve that issue. Nor did it do so in *Jacobellis* v. *Ohio*, 378 U.S. 184, a criminal obscenity case lacking a majority opinion. But in his dissenting opinion in *Jacobellis*, 378 U.S. at 201, Mr. Chief Justice Warren reiterated his belief that:

> Finally, material which is in fact obscene under the *Roth* test may be proscribed in a number of ways—for instance, by confiscation of the material or by prosecution of those who disseminate it—provided always that the proscription, whatever it may be, is imposed in accordance with constitutional standards. *If the proceeding involved is criminal, there must be a right to a jury trial, a right to counsel, and all the other safeguards necessary to assure due process of law.* [Emphasis added.]

The substantiality of the claim to the right to a jury determination of obscenity issues, even where the prosecution is for a misdemeanor offense, would thus seem clear. And the time is now ripe for this Court to consider and resolve the claim in this case, where the issue was raised and decided below and where the state statutory prohibition of a jury trial is absolute.[9] To have the community standards as to obscenity determined and applied in the first instance by one or three judges is to invite and encourage judicial censorship.

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[9] Under § 1141, a second and third offender must be given longer prison terms. A third offender, for example, "shall be sentenced to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars." Yet the third offense is prosecuted as a misdemeanor, with no right to a jury trial. Cf. *United States* v. *Barnett*, 376 U.S. 681, 695, fn. 12.

As was said over forty years ago by Judge Andrews of the New York Court of Appeals, *Halsey* v. *New York Society,* 234 N.Y. 1, 6:

> The conflict among the members of this court itself points a finger at the dangers of a censorship entrusted to men of one profession, of like education and similar surroundings. Far better than we, is a jury drawn from those of varied experience, engaged in various occupations, in close touch with the currents of public feeling, fitted to say whether the defendant had reasonable grounds to believe that a book such as this was obscene or indecent.

To insist upon a jury determination in the first instance as to the issue of obscenity, of course, is completely consistent with the function of this Court and other appellate courts to make "an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis* v. *Ohio,* 378 U.S. 184, 190 (opinion of Brennan, J.). The emergence of a constitutional fact in any given case does not operate to destroy any right to a trial by jury or to merge the functions of the jury with those of the appellate courts. The appellate determination of fact is simply the final assurance that constitutional rights are properly observed in the case.

Petitioner accordingly suggests the appropriateness of a grant of certiorari in this case to review this question, to the end that the jury may be recognized "as the authentic alter ego of the community, reflecting its morals and mores more truly than even the wisest of judges", in effectuating the constitutional standards respecting obscenity. See O'Meara and Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis* v. *Ohio,* 40 Notre Dame Lawyer 1, 12 (1964).

3. The decision below raises the important question whether the State of New York, under any standard recognized by this Court, can constitutionally outlaw the possession and sale of the material in question.

A critical constitutional issue is raised as to the obscenity of the books and magazines involved in this case, an issue that deserves exploration and resolution by this Court. It is an issue similar to the fifth question raised in the Jurisdictional Statement in the *Mishkin* case, i.e., "Are the publications obscene within the construction of the Fourteenth Amendment to the Constitution of the United States?"

Determination of this question necessarily involves consideration of the following: (1) If the concept of obscenity under § 1141 is confined to hard-core pornography, as the New York Court of Appeals held in *People* v. *Richmond County News*, 9 N.Y. 2d 578, 586,[10] do these so-called sado-masochistic publications fall within the scope of hard-core pornography? (2) What is the constitutional limit of the hard-core pornography concept? (3) If the *Roth* standard of testing the material by its prurient appeal under contemporary community standards to "the average person" is followed, can it be said that these sado-masochistic

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[10] The court there said that "we are of the opinion that the prohibitions of section 1141 of the Penal Law should apply only to what may properly be termed 'hard-core pornography.'" Hard-core pornography was in turn defined to mean that which "focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit,' . . . it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the course, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one scholar, 'a debauchery of the sexual faculty.'" 9 N.Y. 2d at 587.

publications, with their limited appeal to those few interested in such subjects, appeal to the prurient interests of "the average person"? Cf. *Manual Enterprises* v. *Day,* 370 U.S. 478, where the prevailing opinion mentioned without resolving the issue whether certain magazines could be considered obscene in terms of their impact on "the average homosexual" rather than on "the average person."

Because of the national circulation of the type of publications here at issue, it is important that a definitive resolution be made of the power of the States, under the federal Constitution, to ban their sale and circulation. The question will continue to plague booksellers, prosecutors and lower courts until this Court finally acts. And that time should be now.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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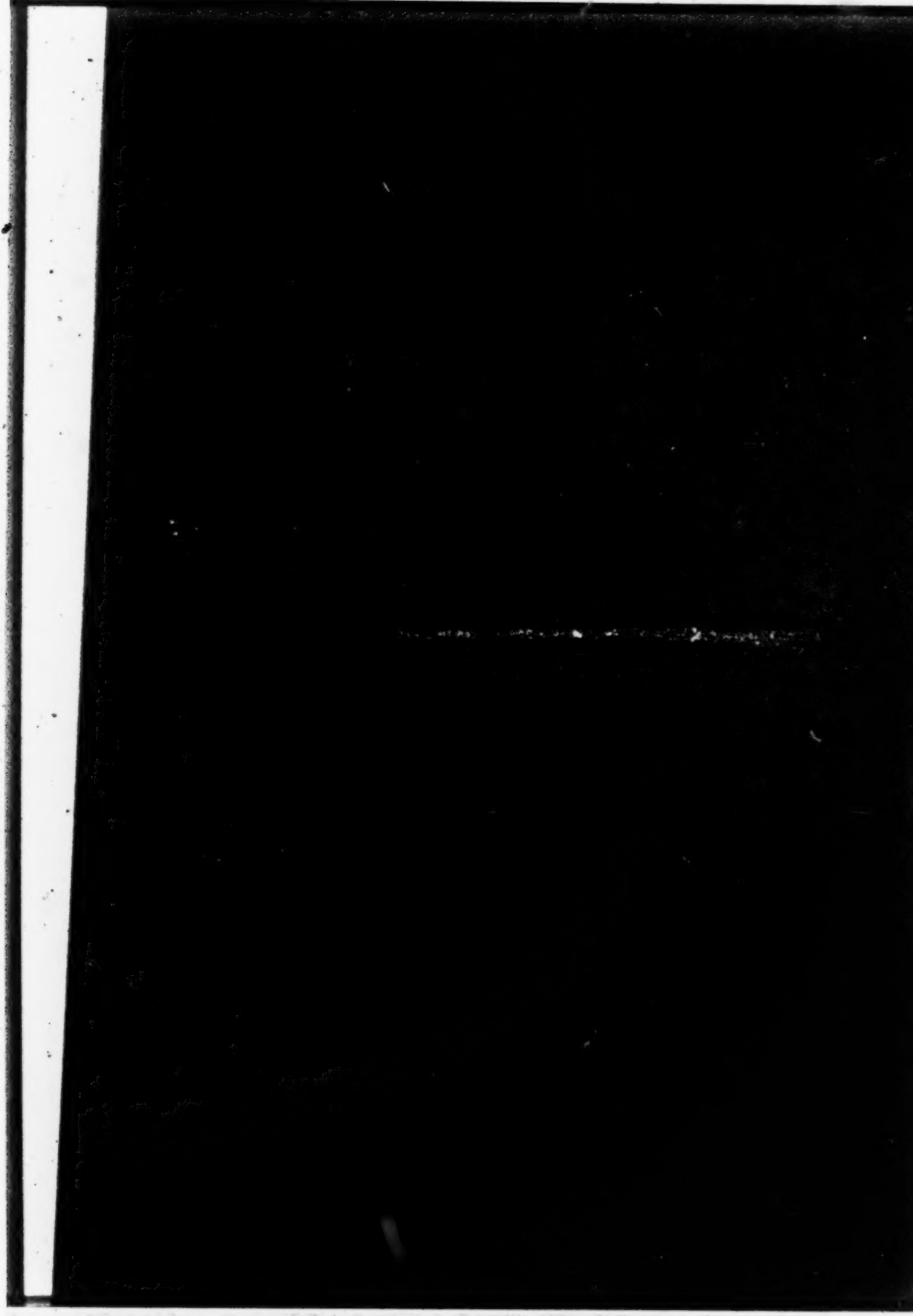
May 13, 1965.



APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

Before: HON. STANLEY H. FULD, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

against

SIDNEY FRIEDMAN, *Appellant*.

Certificate Denying Leave

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. The appellant on this application urged (1) that he was deprived of a jury trial in violation of the First and Fourteenth Amendments to the Federal Constitution and (2) that § 1141 of the Penal Law, in its "proscriptions * * * as to sadistic and masochistic books", is vague and indefinite and violative of the First and Fourteenth Amendments of the Federal Constitution.

Dated at New York, New York
March 4, 1965

/s/ STANLEY H. FULD
Associate Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 135

SIDNEY FRIEDMAN, *Petitioner,*

v.

PEOPLE OF THE STATE OF NEW YORK

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Department

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PETITIONER'S REPLY BRIEF

Petitioner files this Reply Brief in the light of the three decisions of this Court on March 21, 1966—the *Ginzburg, Mishkin* and *Fanny Hill* decisions. Since the Petition for a Writ of Certiorari herein has been held by the Court pending the resolution of those three cases, particularly the *Mishkin* case, it becomes necessary to re-evaluate the questions presented in the Petition.

1. The Questions That Have Been Resolved by the Mishkin Decision.

The decision of this Court in the *Mishkin* case has effectively disposed of two of the three questions presented by the Petition herein—i.e., the First Question as to whether the references to "sadistic" and "masochistic" publications in § 1141 of the New York Penal Law are void for vagueness, and the Third Question as to whether the type of material involved in this and in the *Mishkin* case can be considered obscene under any constitutionally permissible definition of obscenity. But the Second Question presented by the instant Petition, concerning petitioner's constitutional right to a jury determination of the obscenity issue, has in no way been answered or mooted by either the *Mishkin* decision or the *Ginzburg* or *Fanny Hill* decisions. It is a question whose importance and appropriateness for resolution by this Court remain undiluted. And it is a question raised and pending before this Court in the Petition in *Sheperd* v. *New York,* No. 626, Oct. Term 1965.

2. The Unresolved and Important Question as to Petitioner's Constitutional Right to a Jury Determination of the Obscenity of the Publications Sold by Him.

As indicated, none of the opinions rendered by this Court on March 21, 1966, in any way involved or discussed or resolved the Second Question presented by the instant Petition: "Whether a state court conviction of a bookseller for the misdemeanor of having possessed and sold an 'obscene,' 'sadistic,' or 'masochistic' book can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of any absolute right by the defendant to a jury trial and determination of the alleged obscene, sadistic or masochistic nature of the book."

The intrinsic importance of this question, as the Petition (pp. 16-20) indicates, has been attested to by various members of this Court in the *Kingsley, Times Film* and *Jacobellis* cases. And to the extent that "the circumstances of presentation and dissemination of material" (*Ginzburg,* p. 7) now become relevant to the resolution of the obscenity issue, it becomes all the more important for booksellers, defendants, prosecutors and lower courts to know whether there is a constitutional right, even in the setting of a misdemeanor prosecution, to a jury determination of the various factors involved in an obscenity assessment—including "the circumstances of presentation and dissemination of material."

The appropriateness of this issue for review by this Court is further underscored by the decision of the Sixth Circuit in *Volanski* v. *United States,* 246 F. 2d 842, written by the then Circuit Judge Potter Stewart. The trial in that case had originally been before a federal district judge "without intervention of a jury." 246 F. 2d at 843. Following a reversal of the conviction, due to the judge's error in formulating and applying the test of obscenity, the Sixth Circuit remanded the case for a new trial in these words (246 F. 2d at 845):

> "The question in our opinion is peculiarly one best left for *nisi prius* determination, preferably by a jury. * * * [T]he problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury * * *, because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community. * * *

> '[O]bscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation *ad hoc,* like the standard of care.' *United States* v. *Levine,* 2 Cir., 1936, 83 F. 2d 156, 157. A trial court can best determine 'the present critical point in the compromise between candor and shame at which the community may have arrived here and now.' A trial court, particularly with the aid of a jury, can best determine 'the average conscience of the time.' *United States* v. *Kennerley,* D.C. S.D.N.Y. 1913, 209 F. 119, 121."

Petitioner suggests that these comments, like those of Mr. Justice Brennan in the *Kingsley* case (354 U.S. at 448) and those of Mr. Chief Justice Warren in the *Jacobellis* case (378 U.S. at 201)—both quoted in the Petition at pp. 18-19—effectively dispose of respondent's fear (Memorandum, p. 7) that the standard of obscenity necessarily invokes judgments whose complexities and subtleties far exceed the factual determination traditionally entrusted to a jury. Clearly, this problem deserves the attention of this Court.

Finally, the respondent suggests (Memorandum, p. 4) that petitioner's failure to apply for a jury trial pursuant to Section 32 of the New York Criminal Court Act precludes him from complaining that he was denied any constitutional right to such a trial. But as the Petition itself pointed out (p. 9, fn. 3), the issue was properly raised on appeal in jurisdictional terms; as such, the failure to demand a jury trial at the trial court level did not constitute a waiver of jurisdictional objections stemming from the absence of any *absolute* right to a jury trial. See *People* v. *Nicometi,* 12 N.Y. 2d 428, 431. In the absence of such an absolute right, as

made plain by the provisions of the New York City Criminal Court Act (see Secs. 32 and 40), petitioner claimed on appeal that the New York City Criminal Court, composed as it was of three judges acting without a jury, lacked jurisdiction over the criminal misdemeanor proceeding.* And it was that issue that was heard on the merits and resolved against petitioner by the Appellate Term. The issue was thus properly put into question and resolved.

It should also be noted that precisely the same question has been raised in the pending Petition in *Sheperd* v. *New York,* No. 626, Oct. Term 1965. In that case the petitioners did make application under Section 32 for a certification that their cases be prosecuted by indictment and tried by a jury; that application was denied and petitioners were forced to trial before a three-judge court. Once again the issue was raised on appeal and resolved against those petitioners. The experience in *Sheperd* underscores the absence of any *absolute* right to a jury trial in an obscenity misdemeanor prosecution under the New York City Criminal Court Act and justifies the raising of the issue in the instant case in jurisdictional terms on the appeal. If there is a constitutional and absolute right to have a jury trial in such a case, the three judges had no jurisdiction or power to try an obscenity case consistently with the Due Process Clause of the Fourteenth Amendment.

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*"A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." Dissent of Mr. Justice Brennan in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 448.

The Court, however, may wish to hear and consider the jury trial issue separated from its jurisdictional aspects either (1) by withholding action on the instant Petition until the issue in the *Sheperd* case is argued and resolved, or (2) by consolidating the instant case with the *Sheperd* case for plenary consideration of all aspects of the jury trial question.

CONCLUSION

For the reasons expressed in the Petition and for the further reasons set forth herein, a writ of certiorari should issue to review the judgment below. Such a grant of certiorari, of course, may appropriately be limited to the second question presented in the Petition.

Respectfully submitted,

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March 29, 1966.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

FRIEDMAN *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE ~~DIVISION~~ TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 7. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate ~~Division~~ TERM of the Supreme Court of New York, First Judicial Department is reversed. *Redrup* v. *New York,* 386 U. S. ——, decided May 8, 1967.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States,* 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.